

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO. 7:01-CV-36-BO (3)

NORTH CAROLINA SHELLFISH)
GROWERS ASSOCIATION and)
NORTH CAROLINA COASTAL)
FEDERATION,)
)
Plaintiffs,)
)
and)
)
UNITED STATES OF AMERICA,)
)
Plaintiff in Intervention,)
)
v.)
)
HOLLY RIDGE ASSOCIATES, L.L.C.,)
And JOHN A. ELMORE,)
)
Defendants.)
_____)

CONSENT DECREE

I. BACKGROUND

1. The Plaintiffs in this action, the North Carolina Shellfish Growers Association and the North Carolina Coastal Federation ("Plaintiffs"), filed an Amended Complaint against Defendants Holly Ridge Associates, LLC, and John A. Elmore ("Defendants"), alleging that Defendants violated Sections 301(a), 401, 402, and 404 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1311(a), 1341, 1342, and 1344. Subsequently, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed an Complaint in intervention in this action against Holly Ridge Associates, L.L.C., and John A. Elmore, also alleging that Defendants violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. The Amended Complaint and Complaint in Intervention allege that Defendants violated Section 301(a) of the Act by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States without authorization by a CWA Section 404 permit issued by the Corps of Engineers of the United States Department of the Army (“Corps”) and by causing the discharge of pollutants, including storm water associated with construction activity, into waters of the United States without, or in violation of, a CWA Section 402 National Pollutant Discharge Elimination System (“NPDES”) permit issued by the State of North Carolina, at a site known as the “Morris Landing Tract” or “Holly Ridge Tract,” in Onslow County, North Carolina (the “Site”), identified in Appendix 1 (Map) attached to this Consent Decree.

3. The Amended Complaint and Complaint in Intervention seek (1) to enjoin the discharge of pollutants into waters of the United States in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and with any necessary permits, to restore the Site and/or mitigate the environmental harm caused by their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d); and (4) to pay Plaintiffs’ costs, expenses, expert witness fees and reasonable attorneys’ fees as provided in 33 U.S.C. § 1365.

4. After extensive discovery on liability issues, the Plaintiffs and Defendants filed cross motions for summary judgment on the Plaintiffs’ standing to maintain this action. The Plaintiffs also filed a motion for partial summary judgment on several liability issues. The rulings in the Court’s Order filed 25 July 2003 adjudicating those motions will not be recited in full here, but in summary the Order granted the Plaintiffs’ motion for summary judgment on standing and

granted in part and denied in part Plaintiffs' motion for partial summary judgment on liability. Therefore, the Court has concluded as a matter of law that Defendants have violated the CWA in at least some of the respects alleged by the Plaintiffs.

5. This Consent Decree is intended to constitute a complete and final settlement of the Plaintiffs' and United States' claims set forth in the Amended Complaint and Complaint in Intervention in this action.

6. Defendants have agreed to complete restoration of the Site according to the terms of this Consent Decree to the satisfaction of Plaintiffs and United States subject to permits and approvals to be issued by the North Carolina Department of Environment and Natural Resources ("DENR") and the United States Environmental Protection Agency ("EPA"), to pay civil penalties, and to provide other relief as set forth below.

7. The parties to this Consent Decree agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the claims of the Plaintiffs and the United States under the CWA against Defendants in this case.

8. The Court finds that this Consent Decree is a reasonable and fair settlement of the claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

9. Without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ADJUDGED, ORDERED and DECREED as follows:

II. JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and Sections 309(b) and 505 of the CWA, 33 U.S.C. §§ 1319(b), 1365.

11. The Amended Complaint and Complaint in Intervention state claims that, if proven, would support relief pursuant to Sections 301, 309, 402, 404, and 505 of the Act, 33 U.S.C. §§ 1311, 1319, 1342, 1344, and 1365.

12. Venue is proper in the Eastern District of North Carolina pursuant to CWA Sections 309(b) and 505(c), 33 U.S.C. §§ 1319(b) and 1365(c), and 28 U.S.C. §§ 1391(b) and (c), because Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged in the Amended Complaint and Complaint in Intervention arose in this District.

III. PARTIES BOUND AND NOTICE OF TRANSFER

13. The provisions of this Consent Decree shall apply to and be binding upon the Parties, including the Plaintiffs, the United States, and Defendants, including Holly Ridge Associates' officers, directors, agents, employees, servants, successors in ownership of the Morris Landing Tract, assigns, and any person, firm, association or corporation who is, or will be, acting in concert or participation with Defendants in the development or management of the Site whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Defendants, Defendants shall not raise as a defense the failure of any of its officers, directors, agents, employees, servants, successors in ownership of the Site, assigns, or

any person, firm, association or corporation acting in concert or participation with Defendants, in the development or management of the Site, to take any actions necessary to comply with the provisions hereof.

14. No change in ownership, corporate status, or partnership status relating to the Site, or any portion of it, will in any way alter the responsibilities of Defendants under this Consent Decree. In the event of any conveyance of any interest in the Site, or any portion of the Site, all of Defendants' obligations under this Consent Decree shall continue to be met by Defendants. However, Defendants shall not be responsible for the acts or omissions of the Grantee of any conservation easement granted under this Consent Decree, or the invitee or licensee of such Grantee.

15. Each party certifies that at least one of its undersigned representatives is fully authorized by the party whom he or she represents to enter into the terms and conditions of this Consent Decree, to execute it on behalf of that party, and to legally bind the party on whose behalf he or she executes this Consent Decree.

16. During the pendency of this Consent Decree, any deed, title, or other instrument of conveyance executed by Defendants which transfers an interest in the Site, or any portion of the Site, shall contain a notice that the Site or interest therein to be transferred is the subject of this Consent Decree setting forth the type of case, case caption and index number, and the Court having jurisdiction.

17. Upon retention of each contractor performing work contemplated by this Consent Decree, Defendants shall notify each such contractor in writing so that it is made aware of the work schedules, reporting deadlines, and other requirements set forth herein, which are

applicable to the work to be performed by the contractor. Defendants shall further require such contractor to notify in writing each subcontractor performing work contemplated herein of the requirements of this Consent Decree that are applicable to the work to be performed by such subcontractor.

IV. COMPLIANCE RESPONSIBILITY

18. Except as in accordance with this Consent Decree, Defendants are enjoined from discharging any pollutant into waters of the United States at the Site unless such discharge complies with the provisions of the CWA, its implementing regulations, and any permits issued for such discharges. Waters of the United States at the Site have been determined, in part, by the Court's Order on Plaintiffs' Motion for Partial Summary Judgment on Liability, and will further be determined on a jurisdictional delineation to be performed pursuant to this Decree.

19. Defendants shall at all times comply with federal and state laws, rules and regulations governing the discharge of dredged or fill material into the waters of the United States, governing the discharge of pollutants into the waters of the United States, and governing land disturbance at the Site. Defendants shall comply with Sections 301, 402 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311, 1342 and 1344, and all CWA permits required for activities at the Site.

20. Defendants must apply for, be issued, and keep in force an NPDES permit pursuant to section 402 of the CWA for any discharges of stormwater or other pollutants from the weir of the internal lake located on the Site that flows into a ditch that runs to Stump Sound. The permit application must be submitted to DENR within thirty (30) days from July 8, 2004.

21. This Consent Decree does not authorize Defendants to violate any statute, regulation

or permit requirement.

V. COMPLIANCE MEASURES AT THE SITE

22. On or before July 8, 2004, Defendants shall implement the Site Restoration and Mitigation Plan attached to this Consent Decree in Appendix 2, and fully incorporated herein by reference, in accordance with the standards, specifications and schedules stated in that Plan. That Plan provides for restoration of the Site, mitigation for any wetland losses, a method and schedule for determining the jurisdictional extent of waters of the United States on the Site after restoration, and for a conservation easement to preserve and protect wetlands and other waters on and adjoining the Site. After completion of the restoration work required by the Site Restoration and Mitigation Plan above, Defendants shall monitor the areas restored pursuant to such Plan for three years to ensure the effectiveness of the restoration, to stabilize the soil, to reestablish vegetation, and to ensure that the hydrology of each restored area has substantially returned to its pre-disturbance condition. In the event that the EPA or DENR determines that Defendants' restoration work at any portion of the Site has not been effective, Defendants shall perform additional restoration work to stabilize the Site and restore the Site as EPA or DENR may require.

23. All activities performed at the Site by Defendants shall be in compliance with the Act and in compliance with the terms and conditions of any permits issued under the Act. Defendants are solely responsible for making timely application for and obtaining all necessary permits from all governmental bodies for the work required under the Site Restoration and Mitigation Plan identified in Paragraph 22 above and Appendix 2 to this Decree.

24. To ensure that no land disturbing activity occurs at the Site which is inconsistent with

the requirements of this Consent Decree, Defendants shall, within sixty (60) days of July 8, 2004, record a “Notice of Consent Decree” with the Register of Deeds Office, in Onslow County, North Carolina. Such Notice shall include the docket number and date of entry of the Consent Decree. Thereafter, until EPA issues the notice of completion of restoration work described under this Decree, each deed, title, or other instrument conveying an interest in the Site shall contain a notice stating that the property conveyed is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property conveyed under this Consent Decree. Defendants shall provide copies of the Notice recorded with the Onslow County Register of Deeds to Plaintiffs, EPA, DENR, and to the Department of Justice at the addresses contained in Section XIV (Notice).

25. Defendants’ obligations under this Consent Decree are intended to resolve Defendants’ liability for violations of the CWA, as alleged in the Amended Complaint and Complaint in Intervention, and, except as specified in this Decree, are not intended to be used or credited as mitigation for impacts resulting from Defendants’ activities at the Site pursuant to any CWA Section 404 permit from the Corps. Defendants acknowledge that, in the event that they apply for any CWA Section 404 permit for activities at the Site, they will be required to avoid and minimize impacts to waters of the United States, and to mitigate for unavoidable impacts to waters of the United States, in accordance with Section 404(b)(1) of the Act and that Section’s implementing regulations.

VI. SITE ACCESS

26. Plaintiffs, EPA, DENR, and their respective authorized agents (including attorneys, contractors and subcontractors), shall have access to the Site at all reasonable times, after

reasonable notice to Defendants, for the purposes of inspecting, investigating or verifying compliance with the terms of this Consent Decree, including but not limited to, the requirements of Section V (Compliance Measures at the Site). Access shall include access to, and the right to make copies of, all records, documents or information relating to or pertaining to the Site.

27. Defendants shall have the right to accompany Plaintiffs', EPA's, and DENR's representatives and authorized agents throughout their presence at the Site and to monitor and record the investigative activities conducted by EPA, DENR, and Plaintiffs. If such a recording of the investigatory activities is made, Defendants shall, upon written request provide a copy of the recording to Plaintiffs, EPA or DENR.

28. This section in no way limits any right of inspection and/or entry available to EPA or DENR pursuant to applicable federal or state laws, regulations, or permits.

VII. REPORTING AND CERTIFICATIONS

29. Each undersigned representative of Defendant, Plaintiff, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party on whose behalf such representative signs this document.

30. Defendants shall notify the Plaintiffs, EPA and DENR in accordance with the provisions of Section XIV (Notice) within ten (10) days of the occurrence of any of the following events:

- A. Commencement of work implementing the Site Restoration and Mitigation Plan attached to this Consent Decree in Appendix 2;

- B. Completion of work implementing the Site Restoration and Mitigation Plan attached to this Consent Decree in Appendix 2;
- C. Recording of the Notice of Consent Decree required under Paragraph 24;
- D. Commencement and completion of any additional restoration work as specified in Paragraph 22; and
- E. Payment of the penalty as specified in Paragraph 35 below.

31. Within thirty (30) days of completing the restoration work for the Site required under Paragraph 22, Defendants shall submit to Plaintiffs, EPA and DENR, a Restoration Work Report for the Site which shall include: (a) a narrative description of the restoration work performed at the Site; (b) photographs of all restored areas at the Site; and (c) a map indicating where restoration work was performed. No later than thirty (30) days from completing the restoration work for the Site required under Paragraph 22, Defendants shall arrange for Plaintiffs, EPA and DENR to inspect the Site to confirm that the Site Restoration and Mitigation Plan has been fully implemented.

32. In the event that EPA, in consultation with DENR, determines that Defendants have not fully implemented the Site Restoration and Mitigation Plan, EPA may direct Defendants to carry out additional work to fully implement that Plan. EPA's written notification shall specify any measures that are necessary to implement fully the Site Restoration and Mitigation Plan and the time period within which such measures are to be completed. Defendants shall complete the additional measures within the time period specified in EPA's notification and shall inform the EPA, DENR, and Plaintiffs in writing within ten (10) days of the completion of the additional measures. No later than thirty (30) days from the completion of the additional measures,

Defendants shall arrange for EPA and DENR to inspect the Site to confirm that the Restoration Work Plan has been fully implemented.

33. Within thirty (30) days of completion of each one-year interval following submission to Plaintiffs, EPA, and DENR of a Restoration Work Report for the Site required under Paragraph 31 above, (or following submission of Defendants' notification of completion of additional measures in accordance with Paragraph 32 above, if required), Defendants shall submit to Plaintiffs, EPA and DENR a Restoration Monitoring Report for the Site which shall document the success of Defendants' restoration work. The Restoration Monitoring Report shall provide a narrative description of the success of Defendants' restoration work and shall include hydrology monitoring data, photographs of all restored areas, and a map indicating where restoration work was performed. No later than thirty (30) days from completion of the third one-year monitoring period for the Site, Defendants shall arrange for Plaintiffs, EPA and DENR to inspect the Site to confirm the accuracy of Defendants' Restoration Monitoring Reports and the success of Defendants' restoration work at the Site. When EPA, or DENR upon EPA's written delegation, determines that the restoration work has been successfully completed, EPA will provide a proposed written notice of completion to Defendants and Plaintiffs. If Plaintiffs disagree with the proposed determination, Plaintiffs may state in writing their grounds for disagreement and may request an on-site conference of Plaintiffs, Defendants, and EPA or DENR, upon EPA's written delegation, to resolve the difference. The final determination shall be by EPA, or DENR upon EPA's written delegation. EPA, or DENR, upon EPA's written delegation, will not unduly delay in determining completion. In addition, EPA acknowledges that the Site is a large and varied tract and EPA shall not delay a determination of completion

with respect to one portion of the Site because work on another portion is deemed incomplete, unless those portions of the Site are hydrologically interdependent.

34. In all notices, documents, or reports submitted to Plaintiffs, EPA, and DENR pursuant to this Consent Decree, Defendants shall, by a senior management official, sign and certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VIII. CIVIL PENALTIES

35. Defendants shall pay to the United States a civil penalty in the amount of \$5,000.00 within 30 days of July 8, 2004. Payment under this Consent Decree shall be made by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 04 V 0209, EPA Region 4 and the DOJ case number 90-5-1-1-05972. Payment shall be made in accordance with instructions provided to Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of North Carolina. Any payments

received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

36. In the event that the penalty payment is not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

37. Within seven (7) days payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section XIV (Notice) of this Consent Decree, that such payment was made in accordance with this Section.

38. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

IX. SUPPLEMENTAL ENVIRONMENTAL PROJECT

39. The parties have agreed upon a Supplemental Environmental Project in the vicinity of the Site. The parties have determined that the Supplemental Environmental Project described in Appendix 3 to this Consent Decree has substantial monetary value. The project will cost the Defendants at a minimum One Hundred and Eighty Dollars (\$180,000) in out-of-pocket expenses to carry out, and involves the surrender by Defendants of a substantial amount of property with a fair market value estimated by Defendants at Three Hundred Fifty Thousand Dollars (\$350,000). The project has the environmental value of substantially improving tidal exchange and the flow of water in oyster-producing waters near the Site, improving the

beneficial uses of such waters for fish and shellfish production and their overall water quality.

40. Defendants hereby certify that, as of the date of this Consent Decree, Defendants are not required to perform or develop the SEP by any federal, state or local law or regulation; nor are Defendants required to perform or develop the SEP by any other agreement, grant or as injunctive relief in this or any other case. Defendants further certify that they have not received, and are not presently negotiating to receive, credit in any other enforcement action for the SEP.

41. Defendants shall submit a SEP Completion Report to EPA by July 1, 2005, or within 30 days of the completion of the SEP, whichever is sooner. The Report shall contain the following information:

- A. A detailed description of the SEP as implemented;
- B. A description of any operating problems encountered and the solutions thereto;
- C. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Order; and
- D. A description of the environmental and public health benefits resulting from implementation of the SEP.

42. Defendants agree that EPA may inspect the SEP location at any time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.

43. After evaluating the SEP Completion Report and visiting the SEP location, if necessary, the EPA will determine whether the Defendants have completed the SEP in a satisfactory manner.

44. The determinations of whether the SEP has been satisfactorily completed and

whether the Defendants have made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA. If EPA concludes that the SEP has been completed satisfactorily, it will so notify the Defendants in writing. If EPA concludes that the SEP has not been completed satisfactorily, it will notify the Defendants of the deficiencies and provide the Defendants a reasonable time period to correct the deficiencies. If the Defendants do not complete the SEP within the time period allowed, stipulated penalties, as set forth below, will accrue until the Defendants complete the SEP.

X. STIPULATED PENALTIES

45. EPA may assess against the Defendants stipulated penalties for failure to timely fulfill any requirement of this Consent Decree. The amount of such penalty shall be as follows:

- | | | |
|----|---|-------------------------|
| 1. | For Day 1 up to and including

Day 30 of non-compliance | \$100.00 per

day |
| 2. | For Day 31 up to and including
Day 60 of non-compliance | \$500.00 per day |
| 3. | For Day 61 and beyond
of non-compliance. | \$1,000.00 per day |

46. Except as provided in Paragraphs 47 and 48 below, Defendants shall pay stipulated penalties within thirty (30) days of receipt of written demand by EPA for such penalties. The method of payment shall be in accordance with the provisions of Paragraph 51, and interest shall be paid as stated in Paragraph 50.

47. Any disputes concerning the number of days of violation or number of violations that gives rise to the stipulated penalties that cannot be resolved by the parties shall be resolved as provided in Section XI (Dispute Resolution).

48. The filing of a petition requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree, other than the payment of the stipulated penalty. In the event that Defendants do not prevail on the disputed issue, Defendants shall pay stipulated penalties as provided in Paragraph 51.

49. To the extent Defendants demonstrate to Plaintiffs, EPA, or the Court that a delay or other non-compliance was due to a Force Majeure event, as defined in Section XII (Force Majeure), there shall be no stipulated penalties for that delay or non-compliance.

50. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

51. Stipulated penalties under this Section X shall be made by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 04 V 0209, EPA Region 4 and the DOJ case number 90-5-1-1-05972. Payment shall be made in accordance with instructions provided to Defendants by the Financial Litigation Unit of the United States

Attorney's Office for the Eastern District of North Carolina. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

52. Upon payment of any stipulated penalty required by this Consent Decree, Defendants shall provide written notice at the addresses specified in Section XIV (Notice) of this Consent Decree that such payment was made in accordance with this Section.

53. Payment of stipulated civil penalties shall be in addition to any other rights or remedies which may be available to Plaintiffs or United States by reason of Defendants' failure to comply with requirements of this Consent Decree, and any applicable Federal, State or local laws, regulations, or permit(s).

XI. DISPUTE RESOLUTION

54. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of negotiations between the parties to this Consent Decree to attempt to resolve such dispute. The period for negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other party that a dispute exists, unless agreed to in writing by the parties. If the parties are not able to resolve their dispute following the negotiation period, any affected party may petition the Court for resolution of the dispute. The petition shall set forth the nature of the dispute and a proposal for its resolution. Any other affected party shall have thirty (30) days to respond to the petition and propose an alternate resolution. The Court may appoint a Special Master to recommend resolution of such disputes.

55. The filing of a petition asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Section X (Stipulated Penalties) above.

XII. FORCE MAJEURE

56. Defendants shall perform the actions required under this Consent Decree within the time limits set forth in, or approved pursuant to, this Consent Decree, unless the performance is prevented or delayed solely by events that constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including its employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, failure to achieve compliance with the Clean Water Act, its implementing regulations, or permits; increased costs of performance; changed economic circumstances; changed labor relations; normal precipitation (rainfall in excess of the 10 year/24 hour storm event shall not be considered normal) or climate events (sustained drought or winds in excess of 80 MPH shall not be considered normal); changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of the Site; or failure to obtain federal, state or local permits.

57. If Defendants believe that a Force Majeure event has affected their ability to perform any action required under this Consent Decree, Defendants shall notify the Plaintiffs and the United States in writing within seven (7) days of the event in accordance with the provisions of Section XIV (Notice) below. Failure to provide timely and complete notification to Plaintiffs and the United States shall constitute a waiver of Force Majeure as to the event in question. Such notice shall include a discussion of the following:

- a. What action has been affected;
- b. The specific cause(s) of the delay;
- c. The length or estimated duration of the delay; and,
- d. Any measures taken or planned by Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to Plaintiffs and the United States any additional information that they deem appropriate to support Defendants' conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree.

58. Defendants shall bear the burden of proving: (1) that the noncompliance at issue was caused by circumstances beyond the reasonable control of Defendants and any entity controlled by Defendants, including its contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

59. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA and DENR to determine when to begin or resume the operations that had been affected by any Force Majeure event.

60. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section XX of this Consent Decree.

XIII. GENERAL PROVISIONS

61. This Consent Decree shall not relieve Defendants of their obligation to comply with all applicable provisions of federal, state or local law, or regulations, or with any order of the Court, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

62. Compliance with this Consent Decree shall not be a defense to any actions subsequently commenced by Plaintiffs, EPA, or DENR for violations not alleged in the Amended Complaint or Complaint in Intervention.

63. This Consent Decree shall not be construed to affect or limit in any way the obligation of Defendants to comply with all federal, state and local laws and regulations governing the activities required by this Consent Decree.

64. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the Act, 33 U.S.C. §§ 1342 or

1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to Section 404(c) of the Act, 33 U.S.C. § 1344(c).

65. This Consent Decree in no way affects the rights of the Plaintiffs or the United States as against any person or entity not a party to this Consent Decree.

66. The Plaintiffs and the United States reserve any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Defendants for claims not asserted in the Amended Complaint or Complaint in Intervention in this matter.

67. Nothing in this Consent Decree shall constitute an admission of fact or law by Defendants and nothing in this Consent Decree shall positively or negatively impact the authority of the Corps or EPA under relevant provisions of the CWA with regard to future CWA permit applications regarding the Site.

68. The Appendices to this Consent Decree are incorporated into this Consent Decree and are fully enforceable to the same extent, and shall have the same binding effect, as if set forth within the main body of this Consent Decree.

XIV. NOTICE

69. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

TO THE PLAINTIFFS:

Donnell Van Noppen III, Esq.
Derb S. Carter, Jr., Esq.
Southern Environmental Law Center
200 W. Franklin St., Suite 330
Chapel Hill, NC 27516
Phone: (919) 967-1450
Fax: (919) 929-9421

Todd Miller
North Carolina Coastal Federation
3609 Hwy. 24
Newport, NC 28570
Phone: (252) 393-8185
Fax: (252) 393-7508

Mr. Jim Swartzenberg
NCSGA
Post Office Box 269
Smyrna, NC 28579
Phone and Fax: (919) 347-7240

TO THE UNITED STATES:

Chief, Office of Water Legal Support
United States Environmental Protection Agency
Region 4
Office of Environmental Accountability
61 Forsyth Street, S.W.
Atlanta, GA 30303
Phone: 404-562-9529
Fax: 404-562-9486

Chief, Wetlands Regulatory Section
U.S. Environmental Protection Agency
Region 4
Water Management Division
61 Forsyth Street, S.W.
Atlanta, GA 30303
Phone: 404-562-9409
Fax: 404-562-9486

Chief, Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Phone: 202-514-3468
Fax: 202-616-2426

TO DENR:

Margaret Eagles
Assistant General Counsel
NCDENR
1601 Mail Service Center
Raleigh, NC 27699-1601
Phone: (919) 716-6600
Fax: (919) 716-6766

TO THE DEFENDANTS:
Holly Ridge Associates, L.L.C.
c/o Henry E. Miller, III
Post Office Box 1386
Wrightsville Beach, NC 28480
Phone: (910) 332-4114
Fax: (910) 332-4145

and

Holly Ridge Associates, L.L.C.
John A. Elmore
c/o George W. House, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard, LLP
230 N. Elm Street
Post Office Box 26000
Greensboro, NC 27420
Phone: (336) 373-8850
Fax: (336) 378-1001

XV. COSTS

70. The Court determines and the Defendants agree that Plaintiffs are entitled to reasonable attorneys' fees and costs accrued as of the effective date of this Consent Decree.

Defendants and Plaintiffs have reached agreement as to the appropriate amount of the fee and cost recovery and have memorialized those terms in a separate, confidential agreement. The terms of that agreement shall remain confidential, unless one party requests the Court to enforce the terms of the agreement against the other party.

71. As between the United States and the Defendants, each shall bear its own costs and attorney's fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorney's fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

XVI. RELEASE BY DEFENDANTS

72. Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the Plaintiffs or their Counsel or the United States, including any department, agency or instrumentality of the United States, with respect to the Site, this litigation, or this Consent Decree, including but not limited to any claim that there has been a taking of Defendants' property without compensation.

XVII. PUBLIC COMMENT

73. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if changed circumstances subsequent to lodging of the Decree or the comments received indicate to the United States that the proposed judgment is inappropriate, improper, or inadequate. Defendants agree to entry of this Consent

Decree without further consent. In the event that the United States withholds or withdraws its consent, this entire agreement shall be null and void. The United States' decision to withhold or withdraw its consent shall not be subject to judicial review. The Plaintiffs and Defendants agree to be bound by the terms of the proposed Consent Decree submitted to the Court on April 28, 2004, if the United States withholds or withdraws its consent to this decree.

XVIII. CONTINUING JURISDICTION OF THE COURT

74. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIX. MODIFICATION

75. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any dates set forth in this Consent Decree may be extended by written agreement of the parties and notice to the Court. Any other modification of this Consent Decree shall be in writing, and shall not take effect unless signed by Plaintiffs, the United States and Defendants and approved by the Court.

XX. TERMINATION

76. The Court shall terminate the terms of this Consent Decree upon motion filed with the Court by the Plaintiffs, the United States, or Defendants after the following have been completed:

- A. Defendants have timely and satisfactorily completed all of the actions required by this Consent Decree;
- B. Defendants have paid all monies and penalties due under this Consent Decree;
- C. Defendants have submitted a certification to the Plaintiffs and the United States that conditions A. and B. above, have been met; and,
- D. The Plaintiffs and United States, after consultation with the State, has concurred in writing with Defendants' certified contention that conditions A. and B. have been met.

If the Plaintiffs and the United States dispute Defendants' contention that it has complied with these conditions, the provisions of Section XI (Dispute Resolution) shall be invoked. This Consent Decree shall remain in effect pending resolution of the dispute by the parties or the Court.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2004.

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Consent Decree in North Carolina Shellfish Growers Association v. Holly Ridge Associates, L.L.C., Case No. 7:01-CV-36-BO(3), subject to the public notice and comment requirements of 28 C.F.R. § 50.7.

FOR PLAINTIFF THE NORTH CAROLINA SHELLFISH GROWERS ASSOCIATION:

DATE: _____

North Carolina Shellfish Growers Association

FOR PLAINTIFF THE NORTH CAROLINA COASTAL FEDERATION:

DATE: _____

North Carolina Coastal Federation

FOR PLAINTIFF IN INTERVENTION THE UNITED STATES OF AMERICA:

MARTIN McDERMOTT
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

DATE: _____

THOMAS V. SKINNER
Assistant Administrator for Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency
Washington, D.C . 20460

DATE: _____

DAVID DRELICH
Attorney/Advisor
Office for Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Washington, D.C. 20460

DATE: _____

MARY KAY LYNCH
Regional Counsel and
Director Office of Environmental Accountability
U.S. Environmental Protection Agency
Region 4
61 Forsyth St., S.W.
Atlanta, GA 30303

DATE: _____

WILLIAM W. SAPP
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303

DATE: _____

FOR DEFENDANT HOLLY RIDGE ASSOCIATES, LLC

BY: _____
TITLE: _____

DATE: _____

JOHN A. ELMORE

DATE: _____

APPENDIX 1

(Maps)

APPENDIX 2

(Site Restoration and Mitigation Plan)

APPENDIX 3

(SEP Description)

